ALEXANDER L. STEVAS,
CLERK

No. 80-874

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH M. MATHEWS,

Petitioner,

v.

THE STATE OF OREGON,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the State of Oregon

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ROSS M. SHEPARD
72 West Broadway, Suite 200
Eugene, Oregon 97401
Telephone: (503) 484-2611
Attorney for Petitioner

DAVE FROHNMAYER
Attorney General of Oregon
JOHN R. McCULLOCH, JR.
Solicitor General
WILLIAM F. GARY
Deputy Solicitor General
Counsel of Record
VIRGINIA L. LINDER
Assistant Attorney General
100 State Office Building
Salem, Oregon 97310
Telephone: (503) 378-4402
Attorneys for Respondent

03/81

TABLE OF CONTENTS

Response	Page
Question Presented	1
Response to Reasons Relied Upon for Granting the Writ	
I. The Oregon Court of Appeals has Decided a Federal Question of Substance not Heretofore Addressed by This Court in a Written Opinion	2
II. Although There are Some Contrary Decisions, State and Federal Courts Which Have Considered This Issue are Generally in Accord	4
III. The Oregon Court of Appeals Correctly Decided the Question Presented in This Case	6
Conclusion	12

TABLE OF AUTHORITIES

Cases Cited — Page

Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed.2d 323 (1979) 8-9, 11-12

Commonwealth ex rel Finken v. Roop, 234 Pa. Super. 155, 339 A.2d 764 (1975), *cert den,* 424 U.S. 960 (1976) 5,10

Cramer v. Tyars, 23 Cal. 3d 131, 151 Cal. Rptr. 653, 588 P.2d 793 (1979) 6

Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed.2d 662 (1974) 4

French v. Blackburn, 443 U.S. 901, 99 S. Ct. 3091, 61 L. Ed.2d 869 (1979), *mem. decision aff'g,* 428 F. Supp. 1351 (M.D. N.C. 1977) 3-6, 9-10

Gomes v. Gaughan, 471 F.2d 794 (1st Cir. 1973) 5, 9, 10

In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed.2d 527 (1967) 7-8

Kraemer v. Mental Health Board, 199 Neb. 784, 261 N.W.2d 626 (1978), *cert den,* 441 U.S. 960 (1979) 6

Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated on other grounds,* 421 U.S. 957, 95 S. Ct. 1943, 44 L. Ed.2d 445 (1975) 4

Lynch v. Baxley, 386 F. Supp. 387 (M.D. Ala. 1974) 6

Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed.2d 653 (1964) 2

Matter of Ottolini, 30 Ill. Dec. 81, 73 Ill. App. 3d 971, 392 N.E.2d 736 (1979) 6, 10

McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed.2d 647 (1971) 7

McNeil v. Patuxent Institution Director, 407 U.S. 245, 92 S. Ct. 2083, 32 L. Ed.2d 719 (1972) 2, 3

Meek v. Pittenger, 421 U.S. 349, 95 S. Ct. 1753, 44 L. Ed.2d 217 (1975) 4

Moss v. State, 539 S.W.2d 936 (Tex. Civ. App., 1976) 6, 9, 10

People v. Keith, 38 Ill. 2d 405, 231 N.E.2d 387 (1967) 6

State ex rel Hawks v. Lazaro, 157 W. Va. 417, 202 S.E.2d 109 (1974) 6, 10

State ex rel Kiritsis v. Marion Probate Ct., 269 Ind. 550, 381 N.E.2d 1245 (1978) 6, 9, 10

State v. Mathews, 46 Or. App. 757, 613 P.2d 88 (1980) 2, 6

TABLE OF AUTHORITIES—Continued

Cases Cited—Continued

Page

Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Haw. 1976), *as amended sub nom,* Suzuki v. Alba, 438 F. Supp. 1106 (D. Haw. 1977), *rev'd in part, aff'd in part, dismissed in part sub nom,* Suzuki v. Yuen, 617 F.2d 173 (9th Cir. 1980) 5

Tippett v. State of Maryland, 436 F.2d 1153 (4th Cir. 1971), *cert dismissed as improvidently granted,* Muriel v. Baltimore Criminal Court, 407 U.S. 355 (1972) 5

Williams v. Director, Patuxent Institution, 276 Md. 272, 347 A.2d 179 (1975) 3, 6

Constitutional Provisions

US CONST, amend V 1-7, 12

US CONST, amend XIV 1

In the Supreme Court of the United States

No. 80-874

OCTOBER TERM, 1980

JOHN M. MATHEWS,

Petitioner,

v.

THE STATE OF OREGON,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the State of Oregon

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, the State of Oregon, respectfully prays that this Court deny the Petition for Writ of Certiorari to the Oregon Court of Appeals. The opinion in this case is reported at 46 Or. App. 757, 613 P.2d 88 (1980).

QUESTION PRESENTED

Respondent submits that the question presented by this case more accurately is as follows:

Whether the Fifth and Fourteenth Amendments to the United States Constitution guarantee that, in an involuntary civil commitment proceeding, an allegedly mentally ill person may refuse to answer any or all questions on the ground that the answers may be used in that proceeding as a basis for involuntary commitment.

RESPONSE TO REASONS RELIED UPON FOR GRANTING THE WRIT

I.

THE OREGON COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE NOT HERETOFORE ADDRESSED BY THIS COURT IN A WRITTEN OPINION.

The issue raised in this case is whether the Fifth Amendment to the United States Constitution[1] guarantees that, in an involuntary civil commitment proceeding, an allegedly mentally ill person may refuse to answer any or all questions on the ground that the answers given may be used against him as a basis for involuntary commitment.

This case does not involve the right to refuse to answer any questions in an involuntary commitment proceeding if the answer might implicate the person in a criminal matter. The Oregon Court of Appeals correctly acknowledged such a right. *State v. Mathews,* 46 Or. App. 757, 760, 613 P.2d 88, 90 (1980).

This question was presented in *McNeil v. Patuxent Institution Director,* 407 U.S. 245, 92 S. Ct. 2083, 32 L. Ed.2d 719 (1972). In that case, a Maryland state prisoner was confined in a state institution due in part to his refusal to cooperate in a mental examination to

---

[1]The Fifth Amendment is applicable to the states through the Fourteenth Amendment. *Malloy v. Hogan,* 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed.2d 653 (1964).

determine if he was a "defective delinquent." The majority resolved petitioner's challenge without reaching the Fifth Amendment issue. However, in a concurring opinion, Justice Douglas concluded that the Fifth Amendment privilege applied to any statements that might serve as a basis for commitment because "there is harm and self-incrimination wherever there is a deprivation of liberty; and there is such a deprivation * * * if a person is held against his will." *Id.* at 257.

The procedure at issue in *McNeil v. Patuxent Institution Director, id,* later was challenged on Fifth Amendment grounds in the Maryland Court of Appeals. The Maryland court held that the privilege against self-incrimination was inapplicable to proceedings under the defective delinquent statute. *Williams v. Director, Patuxent Institution*, 276 Md. 272, 347 A.2d 179, 195 (1975). This Court denied certiorari in that case. 425 U.S. 976, 96 S. Ct. 2178, 48 L. Ed.2d 801 (1976).

Subsequent to the decision in *McNeil v. Patuxent Institution Decision, supra,* and the denial of certiorari in *Williams v. Director, Patuxent Institution, supra,* this Court summarily affirmed a United States District Court decision which held that the Fifth Amendment privilege against self-incrimination was not applicable to information that might be used in civil commitment proceedings. *French v. Blackburn,* 443

U.S. 901, 99 S. Ct. 3091, 61 L. Ed.2d 869 (1979), *mem decision aff'g,* 428 F Supp 1351 (M.D.N.C. 1977). Although a summary affirmance is not entitled to the same weight as a written opinion, it is nevertheless a decision on the merits and it is entitled to some precedential weight. *See Meek v. Pittenger,* 421 U.S. 349, 367, n. 16, 95 S. Ct. 1753, 44 L. Ed.2d 217 (1975); *Edelman v. Jordan,* 415 U.S. 651, 671, 94 S. Ct. 1347, 39 L. Ed.2d 662 (1974). Thus, this Court has held that the Fifth Amendment privilege is not applicable to civil commitment proceedings, but it has not addressed the issue and treated it fully in a written opinion.

II.

ALTHOUGH THERE ARE SOME CONTRARY DECISIONS, STATE AND FEDERAL COURTS WHICH HAVE CONSIDERED THIS ISSUE ARE GENERALLY IN ACCORD.

Respondent has found only one authoritative decision holding that the Fifth Amendment privilege against self-incrimination applies to information that could be used in a civil commitment proceeding as a basis for involuntary commitment. In *Lessard v. Schmidt,* 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated on other grounds,* 421 U.S. 957, 95 S. Ct. 1943, 44 L. Ed.2d 445 (1975), a three-judge federal district court conducted a broad review of the Wisconsin commitment procedure and held that statements to a psychiatrist, unless made voluntarily after notice of the pos-

sible consequences, cannot provide a basis for commitment, because such statements are incriminating in effect. 349 F. Supp. at 1100-02. Other cases cited for that same proposition include *Suzuki v. Quisenberry,* 411 F. Supp. 1113 (D. Haw. 1976), *as amended sub nom, Suzuki v. Alba,* 438 F. Supp. 1106 (D. Haw. 1977), *rev'd in part, aff'd in part, dismissed in part sub nom, Suzuki v. Yuen,* 617 F.2d 173 (9th Cir. 1980); *Commonwealth ex rel Finken v. Roop,* 234 Pa. Super. 155, 339 A.2d 764 (1975), *cert den,* 424 U.S. 960 (1976). However, in *Suzuki v. Quisenberry, supra,* the Ninth Circuit Court of Appeals reversed the District Court of Hawaii on this point. In *Commonwealth ex rel Finken v. Roop, supra,* the Pennsylvania court was equally divided on the question with three judges holding that the Fifth Amendment applies to commitment proceedings, three judges holding that it does not, and one judge declining to reach the constitutional question.

A significant number of federal and state courts have held that the Fifth Amendment privilege does not protect against compulsory disclosure of information to be used in a commitment hearing. *Suzuki v. Yuen, supra; Gomes v. Gaughan,* 471 F.2d 794 (1st Cir. 1973) (dicta); *Tippett v. State of Maryland,* 436 F.2d 1153 (4th Cir. 1971), *cert dismissed as improvidently granted, sub nom, Muriel v. Baltimore Criminal Court,* 407 U.S. 355 (1972); *French v. Blackburn,* 428 F. Supp. 1351 (M.D.N.C. 1977), *aff'd mem,* 443 U.S.

901, 99 S. Ct. 3091, 61 L. Ed.2d 869 (1979); *Cramer v. Tyars,* 23 Cal. 3d 131, 151 Cal. Rptr. 653, 588 P.2d 793 (1979); *Kraemer v. Mental Health Board,* 199 Neb. 784, 261 N.W.2d 626 (1978), *cert den,* 441 U.S. 960 (1979); *Matter of Ottolini,* 30 Ill. Dec. 81, 73 Ill. App. 3d 971, 392 N.E.2d 736 (1979); *Moss v. State,* 539 S.W.2d 936 (Tex. Civ. App., 1976); *People v. Keith,* 38 Ill. 2d 405, 231 N.E.2d 387 (1967); *State ex rel Kiritsis v. Marion Probate Ct.,* 269 Ind. 550, 381 N.E.2d 1245 (1978); *State ex rel Hawks v. Lazaro,* 157 W. Va. 417, 202 S.E.2d 109 (1974); *Williams v. Director, Patuxent Institution, supra.*[2] The Oregon courts join this line of authority with the decision that is the subject of this petition. *State v. Mathews, supra.*

III.

THE OREGON COURT OF APPEALS CORRECTLY DECIDED THE QUESTION PRESENTED IN THIS CASE.

In this case, the Oregon Court of Appeals addressed the application of the Fifth Amendment privilege against self-incrimination in the context of involuntary commitment proceedings in a thorough and well-

[2] *Lynch v. Baxley,* 386 F. Supp. 387 (M.D. Ala. 1974), although cited by petitioner and by the Oregon Court of Appeals, does not squarely support either line of authority. The majority in that case held that the Fifth Amendment protects disclosures which might be used in a criminal proceeding or which could lead to other evidence that might be so used. 385 F Supp at 394. The dissent criticized the majority for not specifically addressing whether the Fifth Amendment protects disclosures that might be used in a civil commitment proceeding, and the dissent concluded that the privilege should not apply to such disclosures. *Id.* at 402 (Varner, dissenting).

reasoned opinion. As any proper analysis of the issue must, the opinion of the Oregon Court of Appeals included a discussion of this Court's decision in *In re Gault,* 387 U.S. 1, 47-48, 87 S. Ct. 1428, 18 L. Ed.2d 527 (1967). In that case, this Court held that the Fifth Amendment applied in juvenile delinquency cases because such proceedings, although denominated as civil, involve a deprivation of liberty and must be regarded as "criminal" for purposes of the privilege against self-incrimination. But, as the Oregon Court recognized, *Gault* does not support the view that any legal process which threatens confinement to a state institution requires the same constitutional protections as a criminal prosecution.[3] The decision in *Gault* was limited by its reasoning, which relied heavily on the criminal or quasi-criminal nature of the proceeding and of the sanction imposed. A significant aspect of the court's analysis in *Gault* was the recognition that juveniles are frequently confined in adult penal institutions; that they face possible transfer to adult courts for trial as adult offenders; that interrogation by police and other officials has the same potential for coercion with juveniles as it does with adult offenders; and that the realities of the handling of juvenile offenders suggest that such proceedings are frequent-

[3]This Court's unwillingness to apply criminal due process requirements inflexibly to all proceedings involving incarceration is demonstrated in *McKeiver v. Pennsylvania,* 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed.2d 647 (1971) where the Court held that due process does not require trial by jury in a juvenile delinquency case.

ly followed by disciplinary action rather than by individualized treatment. 387 U.S. at 50-51.

These considerations do not apply with the same force in civil commitment proceedings. In *Addington v. Texas,* 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979), this Court considered the burden of proof required in involuntary civil commitment hearings. The Court noted that in such cases, unlike delinquency cases, the state's power is not exercised for punitive purposes. *Id.* at 428. Moreover, the inquiry in the two proceedings is different. A delinquency proceeding is directed at "a straight-forward factual question — did the accused commit the act alleged?" *Id.* at 429. In contrast, the decision of whether a person is mentally ill and in need of confined treatment "turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists." *Id.*

Thus, the Oregon Court of Appeals correctly concluded that the applicability of the privilege against self-incrimination in commitment cases is not controlled by the determination in *Gault* that the privilege applies to juvenile delinquency proceedings. Rather, the Oregon court separately analyzed the question of what process is due in civil commitment cases and applied the factors set forth in *Addington v. Texas, supra,* 441 U.S. at 425. These factors are: first, the private interest that will be affected by the state's action; second, the state's interest; and third, the risk

of an erroneous decision if the procedure is not applied.

In making this analysis, the Oregon court properly balances the competing factors and considers several distinctive aspects of commitment proceedings which have influenced other courts in concluding that the privilege does not apply. First, the decision of the Oregon court recognizes that the interest of the individual is great because of the threatened loss of liberty. *See also French v. Blackburn, supra* at 1358. And, as discussed in *Addington v. Texas, supra,* 441 U.S. at 426, the Oregon decision recognizes that commitment can "engender adverse social consequences" in the form of stigma or otherwise.

But balanced against this individual interest is the legitimate interest of the state under its *parens patriae* powers in providing care for mentally ill persons and in protecting its citizens against injury from such persons. The right of the state to diagnose, care, treat and protect mentally ill persons who are dangerous or unable to care for themselves is one which weighs heavily in the analysis of the procedural process which is due in civil commitment hearings. *See e.g. Addington v. Texas, supra,* 441 U.S. at 426; *Gomes v. Gaughan,* 471 F.2d at 800; *French v. Blackburn,* 428 F. Supp. at 1359; *Moss v. State, supra,* 539 S.W.2d at 946-47; *State ex rel Kiritsis v. Marion Probate Ct., supra,* 381 N.E.2d at 1248. In this regard, the decision

of the Oregon Court of Appeals recognizes that expert diagnosis is an essential ingredient in the reliable identification of mental illness and that the effective use of civil commitment procedures might be seriously impaired or virtually eliminated by permitting an allegedly ill person to remain silent, either in a psychiatric interview or in court. *See also Gomes v. Gaughan, supra* at 799; *French v. Blackburn, supra* at 1359; *Commonwealth ex rel Finken v. Roop, supra,* 339 A.2d at 782 (Van der Vort, dissenting); *Moss v. State, supra,* 539 S.W.2d at 947; *State ex rel Hawks v. Lazaro, supra,* 202 S.E.2d at 126; *State ex rel Kiritsis v. Marion Probate Court, supra,* 381 N.E.2d at 1248.

The final factor to be considered is the risk of an erroneous decision occasioned by the denial of the privilege. Several courts, including Oregon's, have been persuaded that significant other procedural and substantive rights, such as the right to representation by counsel, the right to cross-examine witnesses and the right to an examination by a physician of the subject's choice, are adequate to assure a fair hearing and a correct result. *See e.g. Gomes v. Gaughan, supra* at 800; *Matter of Ottolini, supra* at 739; *Moss v. State, supra,* 539 S.W.2d at 947. Indeed, as recognized in *Moss v. State,* an effective psychiatric examination furthers the reliability of the commitment proceeding by ensuring that commitment will be based on the procedures recognized in the medical profession for

diagnosing the problems of the mentally disturbed patient. 539 S.W.2d at 947. Also, as stated by this Court in *Addington v. Texas*:

> "* * * It may be true that an erroneous commitment is sometimes as undesirable as an erroneous conviction. * * * However, even though an erroneous confinement should be avoided in the first instance, the layers of professional review and observation of the patient's condition and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected. Moreover, it is not true that the release of a genuinely mentally ill person is no worse for the individual than the failure to convict the guilty. One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma. * * * It cannot be said, therefore, that it is much better for a mentally ill person to 'go free' than for a mentally normal person to be committed." (citations omitted) 441 U.S. at 428-29.

The Oregon court has struck the proper and necessary balance in weighing the foregoing considerations. Although a civil commitment proceeding must comport with due process, such a proceeding is not identical to a criminal prosecution and, for constitutional purposes, the two are not the same. Civil commitment is not punishment, either in its design or purpose. The state's interest in such a proceeding is the diagnosis, care, treatment and protection of mentally ill persons who are unable to care for themselves or who threaten

the safety of others in the community. Extension of the Fifth Amendment privilege to information that may potentially be used as a basis for involuntary civil commitment would seriously impair the effective use of such procedures. As this Court stated in *Addington v. Texas, supra,* practical considerations may limit the requirements of constitutional due process and a state should not be required to employ procedures that "may completely undercut its efforts to further the legitimate interests of both the state and the patient that are served by civil commitments." 441 U.S. at 430.

The Oregon court has joined the overwhelming majority of state and federal courts in concluding that the Fifth Amendment does not protect against the compelled disclosure of information which may be used as a basis for involuntary civil commitment. The decision of the Oregon Court of Appeals is correct in its analysis and conclusion, and its judgment should be allowed to stand.

CONCLUSION

Respondent, the State of Oregon, respectfully submits that the Oregon Court of Appeals correctly decided a substantial question of federal constitutional law in a manner consistent with the decisions of a clear majority of state and federal courts. There is no substantial conflict in the lower court decisions on this

issue. Respondents respectfully pray that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

DAVE FROHNMAYER
Attorney General of Oregon
JOHN R. McCULLOCH, JR.
Solicitor General
WILLIAM F. GARY
Deputy Solicitor General
VIRGINIA L. LINDER
Assistant Attorney General
Attorneys for Respondent

baw